

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of 47 C.F.R. § 1.1200)
et seq. Concerning *Ex parte*)
Presentations in Commission)
Proceedings)

GC Docket No. 95-21

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NYNEX COMMENTS

The NYNEX Telephone Companies¹ hereby file their comments on the Commission's Notice of Proposed Rulemaking ("*NPRM*") in the above-referenced proceeding.

In the *NPRM*, the Commission proposes to reform its *ex parte* rules to make them easier to understand and, in some ways, less restrictive. NYNEX supports this effort. However, some of the Commission's proposals, while well intentioned, would increase the burden on the parties and on the Commission's staff in complying with the *ex parte* rules. Such a result would be contrary to efforts by the administration to make government more efficient and less burdensome. In these Comments, NYNEX suggests modifications to the Commission's proposed rules that would reduce the amount of paperwork and

¹ The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

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that would help facilitate communications between the Commission and interested parties.

I. The Commission Should Not Apply The Permit-But-Disclose Rules To Informal Complaint Proceedings Or To Tariff Filings Before An Investigation Is Established.

The Commission proposes to classify all proceedings as “restricted,”² “permit-but-disclose,”³ and “exempt.”⁴ The Commission would narrow the classification of “restricted” to include only those proceedings required to be restricted by the Administrative Procedure Act⁵ and those proceedings that the Commission specifies as restricted on a case-by-case basis. This would shift the classification of formal complaint proceedings from “restricted” to “permit-but-disclose.” The Commission also would expand the classification of “permit-but-

² In restricted proceedings, *ex parte* contacts would be prohibited, except for certain types of communications. See NPRM at paras. 26, 29; proposed Sections 1.1204, 1.1208.

³ Permit-but-disclose would replace the current classification of “non-restricted,” which may have caused confusion in the past because non-restricted proceedings are subject to *ex parte* disclosure rules. In permit-but-disclose proceedings, *ex parte* contacts would be permitted, but the person making the *ex parte* contact would have to place a memorandum of the substance of the contact in the Commission's *ex parte* file.

⁴ Under proposed Section 1.1204, certain *types* of *ex parte* presentations would be exempt in all proceedings from the prohibitions and from the disclosure requirements. See proposed Section 1.1204(a). In addition, certain *proceedings* would be exempt from the *ex parte* rules, unless classified as permit-but-disclose by order of the Commission. See proposed Section 1.1204(b).

⁵ See 5 U.S.C. Section 557(d). This would include only formal adjudications and rulemakings required to be determined “on the record” after an evidentiary hearing. See 5 U.S.C. Section 557(a).

disclose" proceedings to include (1) tariff filings where any party has filed a pleading; and (2) informal complaint proceedings.⁶

NYNEX supports the Commission's proposal to place formal complaint proceedings in the "permit-but-disclose" category. This would promote communications between the Commission's staff and the parties without compromising any party's ability to respond to opposing arguments. Because the content of all *ex parte* communications would be placed in the public record, there would be no perception of unfair influence.

However, NYNEX does not support expansion of the permit-but-disclose category to include informal complaints where the complainant has served the carrier. An informal proceeding, by its very nature, is designed to minimize legalistic procedural requirements and to facilitate resolution of the issues through direct communications between the parties and the Commission.⁷ It would be counterproductive to encumber such proceedings with additional procedural requirements.⁸ Application of the permit-but-disclose rules to

⁶ See NPRM at paras. 29. 32. The permit-but-disclose rules would apply to tariff filings and to informal complaint proceedings when there is more than one "party." The triggering event for multi-party status would be the filing of a pleading by a party other than the tariff-filer or service of an informal complaint on the carrier by the complainant.

⁷ The Commission's rules provide that if an informal complainant is not satisfied by the carrier's response or by the staff's disposition of the complaint, the complainant may file a formal complaint. See 47 C.F.R. Section 1.717. When the formal complaint is served on a carrier, the permit-but-disclose rules would apply.

⁸ In particular cases where the Commission determines that formal disclosure requirements would serve the public interest, the proposed rules would permit

informal complaints would burden primarily the complainants, who are typically members of the public who are not represented by counsel. They are unlikely to be aware that they are subjecting themselves to the Commission's *ex parte* rules simply by sending a copy of the complaint to the carrier. They may not know that a phone call to the Commission's staff could trigger disclosure requirements where such service has been made, and they are unlikely to be familiar with the procedure for filing an *ex parte* notice.

Moreover, expansion of the permit-but-disclose rules to informal proceedings would greatly expand the volume of *ex parte* filings. In 1994, the Informal Complaints and Public Inquiries Branch received over 17,000 written complaints and inquiries and over 25,000 telephone complaints and inquiries.⁹ If even a small fraction of these communications were subject to the permit-but-disclose rules, the *ex parte* filing system would be swamped. The Commission has not shown any benefit from applying the permit-but-disclose rules to informal complaint proceedings that would outweigh the inefficiencies that would be created.

NYNEX also does not support expansion of the permit-but-disclose category to include tariff filings.¹⁰ In a tariff filing, the carrier and the

the Commission's staff to apply the permit-but-disclose reporting requirements to informal complaint proceedings. See proposed Section 1.1204(b)(1).

⁹ See notice of Informal Working Forum on April 12, 1995.

¹⁰ In practice, this requirement would apply only to the "dominant" local exchange carriers, since the Commission permits non-dominant carriers to file tariffs on one day's notice. See 47 C.F.R. Section 61.23(c).

Commission's staff typically communicate on an informal basis, usually at the staff's request, to clarify terms of the tariff and to produce additional information to assist the staff.¹¹ Similarly, the Commission's staff may communicate informally with parties opposing the tariff filing. At the current time, neither type of communication is subject to disclosure requirements prior to an order establishing an investigation. Yet, neither the carriers nor the parties that have opposed tariff filings have complained that the current procedures are unfair. The Commission's proposal would greatly expand the volume of *ex parte* disclosure filings without significantly improving the Commission's ability to process tariff filings. Because many tariff filings are made on short notice, the additional *ex parte* requirements could delay the introduction of new services by inhibiting the free flow of information between the staff and the parties.

For these reasons, the Commission should treat tariff filings as exempt unless an investigation has been ordered or unless the Commission's staff has decided to classify a particular tariff proceeding as "permit-but-disclose" on a case-by-case basis.¹²

¹¹ Although Section 1.1204(a)(8) would classify presentations requested by the Commission's staff as exempt, the presentations would be subject to the disclosure requirements of a permit-but-disclose proceeding where a party had filed a pleading in response to the tariff filing. See Section 1.1204(a)(8)(iii); Section 1.1206(d).

¹² For this purpose, the Commission could add tariff filings to the category of proceedings where the Commission's staff could invoke the permit-but-disclose rules under proposed Section 1.1204(b).

II. The Commission Should Take Steps To Make *Ex parte* Filings Available To The Public On A More Timely Basis.

The Commission proposes to make notifications of oral *ex parte* contacts more informative by requiring such notifications to summarize the content of the presentation, regardless of whether the presentation concerns data or arguments already in the record of the proceeding.¹³ To give parties more time to prepare detailed summaries of oral *ex parte* contacts, the Commission tentatively decided that it would allow parties to file such notifications within three days of the presentation. While NYNEX agrees with the Commission that notifications should be more informative, the Commission should not adopt rules that would increase the delay in making *ex parte* disclosure statements available to opposing parties.

The proposal to require detailed summaries of all oral *ex parte* presentations has merit. Currently, parties need not disclose the content of an oral *ex parte* presentation if it concerns matters that are "already reflected in that person's written comments"¹⁴ However, comments in the record typically are extensive, so that it is impossible to know what particular message has been conveyed in an oral *ex parte* contact. Opposing parties often feel a need to respond to such contacts in a general fashion to offset the influence of the *ex parte* contact. If a party making an oral *ex parte* contact were to identify the issues

¹³ See NPRM at para. 45.

¹⁴ See 47 C.F.R. Section 1.1206(a)(2).

discussed, opposing parties could target their responses to those issues. This would help focus the debate, provide more useful information to the Commission, and save time for the parties and the Commission's staff.

The Commission should not allow three days for the filing of notifications of oral *ex parte* contacts. This would only add to the delay in making *ex parte* notifications available to the public. Currently, it can take over two weeks for the Commission to issue public notices of *ex parte* contacts.¹⁵ This makes it extremely difficult for parties to respond to arguments on a timely basis.

There is no need for a three-day delay in filing notifications. Even where an *ex parte* presentation is made orally, a party usually prepares for the presentation in advance. Indeed, parties often prepare viewgraphs to organize their thoughts and to leave as summaries for the staff. Impromptu oral *ex parte* contacts are usually short and can be summarized easily. For these reasons, the Commission should require notification filings by the close of business on the day after the presentation.

The Commission also should take affirmative steps to make *ex parte* notifications available to the parties on a timely basis. The problem of delay will

¹⁵ For example, the February 24, 1995 Public Notice of *Ex parte* Presentations and Post-Reply Comment Period Filings in Non-Restricted Proceedings listed *ex parte* presentations made on or before February 10, 1995. The delay is caused by the time it takes for the Secretary's office to screen the many *ex parte* and post-reply comment period filings and to provide copies to the staff persons involved.

become more critical if, as the Commission proposes in the *NPRM*, the category of permit-but-disclose proceedings is expanded substantially.

3. The Commission Should Apply Only A Limited "Sunshine Period" Prohibition To Circulation Items.

The Commission asked for comments on its proposal to apply the "Sunshine Period" prohibitions to circulation items.¹⁶ Presentations, whether *ex parte* or not, are completely prohibited during the Sunshine Period, defined as the time beginning with the release of a public notice listing a matter for consideration at an open Commission meeting and ending with release of an order, deletion of the item from the meeting agenda, or referral back to the staff for further consideration. This prohibition was designed to give the Commission a "period of repose" during which it could consider the matter without interruption and other external pressures.¹⁷ The Commission questions whether it should designate a similar period for circulation items starting with the issuance of a news release announcing action on a circulation item.

This proposal would not provide a "period of repose," because it would start after all of the Commissioners have voted on a circulation item. Nonetheless, it has merit, because it would prevent the parties from trying to

¹⁶ See *NPRM* at para. 40; proposed Section 1.1203(b)(2).

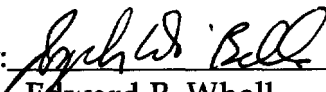
¹⁷ See *NPRM* at para. 39.

influence the editing process that sometimes occurs between the time that the Commissioners vote an item and the time that the order is released.

The Commission should not adopt a "sunshine period" for circulation items that would begin prior to the time that all of the Commissioners have voted on an item. Circulation items frequently are in the Commissioners' offices for months before all of the Commissioners have voted. A Sunshine Period prohibition for such a long period would cut off the Commission from information that could be relevant to its decisions, especially if conditions have changed from the time that the circulation item was prepared. Therefore, the Sunshine Period prohibition should only apply to the relatively short period from the time that the Commission adopts an order to the time that the order is released.

Respectfully submitted,

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